



STATE BOARD OF EQUALIZATION

February 8, 1995

Re: --- --- ---

Dear: --- --- ---

Enclosed is a copy of the Decision and Recommendation pertaining to the above-referenced petition for redetermination. I have recommended that the petition be granted in part and denied in part.

Please read the Decision and Recommendation carefully. If you accept the decision, no further action is necessary. If you disagree with the decision, you have the following two options:

REQUEST FOR RECONSIDERATION. If you have new evidence and/or contentions not previously considered, you should file a Request for Reconsideration. Any such request must be sent to me within 30 days from the date of this letter, at the post office box listed above, with a copy to the Principal Tax Auditor at the same box number. No special form is required, but the request must clearly set forth any new contentions; and any new evidence must be attached.

BOARD HEARING. If you have no new evidence and/or contentions, but wish to have an oral hearing before the Board, a written request must be filed within 30 days from the date of this letter with Mrs. Mary Ann Stumpf, Business Tax Appeals Analyst, Board Proceedings Division, at the above post office box.

The above options are also available to the Sales and Use Tax Department. If the Department requests reconsideration or an oral hearing before the Board, you will be notified and given a chance to respond.

If neither a request for Board hearing nor a Request for Reconsideration is received within 30 days from the date of this letter, the Decision and Recommendation will be presented to the Board for final consideration and action. Official notice of the Board's action will then be mailed to you.

Sincerely,

Carl J. Bessent
Staff Counsel

CJB:ct
Enclosure

cc: Mrs. Mary Ann Stumpf (MIC:81)
Business Tax Appeals Analyst
Board Proceedings Division (w/enclosure)

Principal Tax Auditor (MIC:49) (file attached)

San Bernardino - District Administrator (EH) (w/enclosure)

City of Industry - District Administrator (AP) (wj.enclosure)

Summary

Petitioner is a partnership doing business as --- --- Petitioner's business is that of a printer, primarily commercial work. The start date of the partnership was January 1989. There was no prior audit of the partnership.

On a bi-monthly basis, petitioner prints a magazine for the --- --- ---. Once a year, petitioner prints the --- directory.

Petitioner contends that the directory should be nontaxable under Revenue and Taxation Code Section 6362.7 and 6362.8 and Sales and Use Tax Regulation 1590(a) (2).

At the conference, the Sales and Use Tax Department (Department) pointed out that Section 6362.7 and 6362.8 did not take effect until after the 1991 directory was issued.

Petitioner contends that the directory is issued as a seventh edition of an exempt periodical which is distributed to subscribers of the periodical at no extra cost. However, the Department states that the directory is different in format, size, and name from the bi-monthly magazine.

Petitioner states that --- printed the --- magazine and --- directory while a sole proprietor. --- was audited through March 31, 1987 and according to petitioner, the Department did not inform --- that the directory was taxable. Petitioner believes that it should not be held liable for the tax because the partnership relied on the audit of the sole proprietorship.

The Department stated that the sole proprietorship of --- --- and the current partnership of --- and --- are two separate "persons" for sales and use tax purposes.

At the conference, I asked the auditor, Mr. Spaeth, to review the audit of --- to see if there were any mention of directories. In a subsequent phone conversation with Mr. Spaeth, he said he did not see any discussion of directories in the audit of ---.

At the conference, petitioner contended that the directories in question are exempt from tax on the basis that they are printed sales messages. Petitioner stated that they met the requirements of Regulation 1541.5(b) (1) through (3), which should exempt the directories.

In a memorandum dated November 17, 1994, the auditor stated that petitioner is correct with the exception of compliance with Regulation 1541.5(b) (3). The auditor stated that the directories do contain more than 50 percent advertising; thus, the principal purpose requirement was met. The auditor verified compliance with Regulation 1541.5(b) (1) and (2). However, the auditor concluded that Regulation 1541.5(b) (3) was not met with respect to approximately 275 copies of the ' directory a year because the recipients of these copies were the members of an organization who pay an annual fee which includes the right to receive a copy of the annual directory. The Department believes that the interpretation of "cost" as defined in Regulation 1541.5(a) (5) includes such annual fees. The Department concluded that the remainder of the directories should qualify as exempt as they meet the requirements of Regulation 1541.5.

In a letter dated December 14, 1994, petitioner stated that they would agree to pay a percentage based on 275 directories not being exempt. However, petitioner further indicated that it should not have to pay any interest on the tax.

Analysis and Conclusions

Subdivision (a) (2) of Sales and Use Tax Regulation 1590 defines the term “periodical” for purposes of the former sales and use tax exemption to mean:

“... those publications which appear at stated intervals, each issue of which contains news or information of general interest to the public, or to some particular organization or group of persons, Each issue must bear a relationship to prior or subsequent issues in respect to continuity of literary character.... The term does not include catalogs, programs, score-cards, handbills, price lists, order forms or maps...”

It is consistently being held that mere lists of addresses, telephone numbers, and other identifying information do not meet the definition of periodical, even if they are updated at periodic intervals because they lack literary character in content. {See, e.g., Sales and Use Tax Annotation 385.0840 {4/23/57}, 385.0930 {2/18/77}, and 385.1600 {12/15/65}.

Petitioner contends that the --- directory is like an extra issue of the --- magazine and thus exempt. However, Sales and Use Tax Annotation 385.0900 {6/26/52} clarifies that a “directory issue” is “not considered as thirteenth issue of monthly magazine where the format size, and name is [sic] different from the monthly magazine”.

The directory does not bear a relationship to prior or subsequent issues of the magazine in respect to continuity of literary character or similarity of subject matter. There is no connection between the different issues of the series and the nature of the articles appearing in the --- magazine and the directory. The ---magazine is described volume and number and has a featured article “President's Message”. I conclude that the directory does not qualify as a periodical.

Next, petitioner states that when --- operated the business as a sole proprietorship, he was audited through the period March 31, 1987 and the Department did not inform --- that the directory was taxable. Revenue and Taxation Code Section 6596 gives authority to the Board to relieve taxpayers of tax, interest or penalty where the Board finds that the taxpayer reasonably relied upon written advice from the Board. However, a condition that must be satisfied to use this statute is a request in writing to the Board for advice whether a particular activity or transaction is subject to the sales or use tax. In this matter, there is no request in writing from petitioner.

On September 30, 1992, the Board delegated to the Department authority to relieve taxpayers of tax, interest and penalty as provided by Section 6596 under the following limited circumstances:

“(2) Where the issue in question was clearly discussed in the prior audit and the essence of the advice to the taxpayer is set forth in writing and the working papers. Both staff and the taxpayer must agree that the erroneous advice was provided in the prior audit. In all other cases, claims of reliance on erroneous advice must be ruled upon by the Board members.” (State Board of Equalization Operations Memo 1012, p. 4, August 13, 1993.)

I reviewed the audit of --- and found no indication that directories were to be treated as nontaxable. Petitioner must show that the claimed exempt directories were examined in --- prior

audit, found to be nontaxable, and stated as such in writing in the audit workpapers. There is no such writing in the prior audit workpapers. Furthermore, there must be an agreement between the parties that erroneous written advice was provided in the prior audit. The Department denies that it gave any erroneous advice to ---. Thus, petitioner cannot receive relief under Section 6596.

Both petitioner and the Department agree that the directory should be treated as a printed sales message except for 275 copies a year which do not meet the requirement of Regulation 1541.5(b) (3). I see no reason to disagree with petitioner and the Department. Therefore, the remainder of the directories qualify as exempt as they meet the requirements of Regulation 1541.5.

Petitioner contends that the interest should be deleted. Petitioner did not elaborate on his reasons why interest should be deleted.

Interest applies to all determinations from the date on which the tax becomes due and payable until the date of payment. (Rev. & Tax. Code § 6482.) The interest cannot be deleted. Petitioner was charged interest for the use of the money not timely received by the Board in the same manner petitioner would have been charged if they had borrowed the funds from a lending institution, such as a bank.

Recommendation

Reduce the measure of tax to only 275 copies of the directory per year. The remainder of the directories are exempt as they meet the requirements of Regulation 1541.5.

Carl Bessent, Staff Counsel

Date